UNITED STATES
v
Master Sergeant RAYMOND G. DECHAMPLAIN, FR 043-24-7022,
Detachment 8, 1131st Special Activities Squadron

ACM 21034*

5 October 1972

Charges and specifications §§ 21, 37, 45; Review § 37 — pretrial advice — use in appellate review to determine prosecution's theory in pleading federal statutes.

1. Where trial proceedings fail to disclose upon which of two theories the prosecution is relying in the pleading of two specifications involving federal statutes, the Court of Military Review is justified in consulting the staff judge advocate's pretrial advice as it is the formal basis for the convening authority's referring charges to trial.

Charges and specifications § 45; Conduct, etc. § 48; Courts-martial § 43; Review § 37; War and defense § 47 — jurisdiction — communication of classified information — allegation of US Code violation not surplusage.

2. In considering the jurisdictional question raised by the accused, the Court of Military Review would not concern itself with whether the offenses involved could have been alleged or prosecuted under the first or second clauses of Article 134, where two specifications alleged violations of 50 USC 783(b), relating to the communicating by the accused in Thailand of classified information affecting the security of the United States to a foreign agent, and where the pretrial advice established that the convening authority referred these specifications to trial on the basis that they alleged "crimes and offenses not capital" under the third clause of Article 134. Accordingly, the trial judge erred in treating the statutory references as surplusage.

Conduct, etc. § 48 — Courts-martial § 43; War and defense § 47 — jurisdiction — extraterritorial application of 50 USC 783(b).

3. Section 783(b) of title 50, US Code, which in general proscribes communication of classified information affecting United States security to a foreign agent by a United States officer or employee, applies extraterritorially, so that it applied in Thailand where the offenses occurred; consequently, jurisdiction existed for the court-martial which tried and convicted the accused. By its terms, the statute is intended to protect the United States against disclosure of information that would affect its own security as a nation; it is directed against its own officers or employees; the nature of the offense is such that it can be committed anywhere with no act incident thereto necessarily to be done within the United States; and the harm to the sovereign is clearly the same without regard to whether the security information is unlawfully communicated within the United States or beyond its territorial jurisdiction; each test

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* Consult Table of Cases by Name of Accused for appellate history.

of United States v Bowman, 260 US 94, 67 L Ed 149, 43 S Ct 39 (1922), supports the conclusion that the statute is not dependent on locality for jurisdiction.

Charges and specifications § 15 — allegations as determinative of offense charged and its statutory basis.

4. The question of what offense is charged and upon what statute it is founded is a matter of law; allegations in the indictment will determine these issues.

Conduct, etc. § 48; Courts-martial § 43; War and defense § 47 — jurisdiction — offenses charged as being noncapital — immaterial that capital offense may have been alleged.

5. Where the jurisdiction of the court which tried and convicted the accused for offenses involving his dealings with a foreign agent in Thailand with classified information affecting United States security was challenged on the basis that the government had alleged noncapital offenses under Article 134 as a subterfuge to assert jurisdiction when in fact the government knew, intended to prove, and introduced evidence at the accused's trial that the accused had committed a capital offense in violation of 18 USC 794, the Court of Military Review considered the language of the relevant specifications, omitting references to the statutes, and determined that the essential elements of the offense proscribed by 50 USC 783(b) had been alleged and that it was clear that the offense charged in each specification was that defined by the cited statute. The Court noted that it was immaterial whether a conviction of a violation of 18 USC 794(a), a capital offense, could have been sustained based upon evidence presented by the government.

Conduct, etc. § 48; Courts-martial § 43; War and defense § 47 — jurisdiction under Art. 134 — punishment under 50 USC 783(b) as noncapital.

6. Since the offenses of which the accused had been convicted were based upon 50 USC 783(b), and as such, punishable by no more than confinement and a fine, they were noncapital and the court-martial had jurisdiction under Article 134.

Conduct, etc. § 48; War and defense § 47 — construction of 18 USC 793 (d) — modifying phrase superfluous.

7. The legislative history of 18 USC 793(d) makes it clear that the phrase "which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," modifies only "information relating to the national defense," and not the other items enumerated therein; accordingly, since the accused had been charged with having unlawfully delivered and attempted to deliver, two of the other items enumerated, the added pleading of the above-quoted modifying phrase was superfluous.

Evidence § 127 — pretrial statements inadmissible — continued attempts to interrogate after indication accused desired to remain silent.

8. Where, during custodial interrogations on the night of his apprehension, 2 July, and on the following day, the accused had been advised of his right to remain silent before each interrogation, but had then been plied with potentially incriminating questions for a total of about

4 hours, his subsequent unwavering silence could only be interpreted as an exercise of his right of silence. Accordingly, the interrogating agent was required to desist. For the agent to have persisted until 7 July, when an oral statement incriminating the accused was obtained, was impermissible; the oral statement obtained and the written ones subsequently following it were inadmissible.

Evidence § 127 — voluntariness of pretrial statement — knowing and voluntary relinquishment by accused of right to silence.

9. Where the accused, on the fifth day of questioning and after about 2 hours on that day of not answering questions concerning the offenses, communicated his desire, under Miranda guidelines, to remain silent to the interrogating agent by shaking his head in negative fashion, and where the record, at least inferentially, reflected the interrogator's understanding of the accused's desire not to answer questions about "the investigation," the investigator had the duty to stop the interrogation; the accused's subsequent oral inculpatory statement was involuntary and as such inadmissible as were all subsequent written statements.

Evidence §§ 125, 127 — pretrial statement — government's burden of proof — initial responsibility of military judge to determine voluntariness.

10. The burden of proof to show the admissibility of a pretrial statement of an accused is on the government; the initial responsibility of determining voluntariness is upon the trial judge. A ruling of the trial judge, admitting the confession, must be supported by a preponderance of the evidence, which clearly and convincingly demonstrates a waiver of the accused's rights. In determining this question, the totality of the circumstances leading to and accompanying the giving of the statement, such as the mode of arrest, manner of custody, and methods employed in exacting the confession, are to be considered.

Evidence §§ 127, 129 — pretrial statement — suggestion of benefit as unlawful inducement.

11. Where the accused had been told by his interrogator how the foreign country, to one of whose agents he was suspected of disclosing classified information affecting United States security, "handled agents of theirs who had been picked up," particularly when one was an American serviceman, and that the accused should rely on the United States to protect his family against whom a threat had been communicated, the interrogating agent's statement concerning the protection of the accused's family did not amount to an unqualified declaration that the accused would benefit from confessing. (Distinguishing United States v Carmichael, 21 USCMA 530, 45 CMR 304; United States v Handsome, 21 USCMA 330, 45 CMR 104.)

Evidence § 127 — pretrial statements inadmissible after accused's confinement with visitors restricted and repeated questioning.

12. Where the accused had been confined from the night of 2 July, the date of his apprehension, virtually incommunicado, with his only permitted visitors, as late as 6 July, being criminal investigators and a lawyer "if he requests legal counsel," and where the accused had been interrogated on three separate occasions over a period of somewhat less than 5 days for a combined total of at least 5½ hours, during which he

would not talk about his case until finally, after a statement had been made to him by his interrogator about his having been dealing in Thailand with the "big boys" in his communicating to them of classified information affecting United States security and how these "big boys" either helped to get an important agent freed or if not, "took care of" one who was caught and that the interrogating agent knew of no efforts to free the accused, at which point the accused "slumped in his chair" and after taking a short walk outside the interview room, gave an oral statement concerning the offenses. For these reasons, the accused's oral incriminating statement of 7 July had been induced by the interrogator's "big boys" statement and an assurance of United States goverment assistance in protecting the accused's family. There was no evidence of record to indicate that accused's confession resulted from any other forces or that he affirmatively waived his right to silence. Accordingly, the accused's oral statement of 7 July was inadmissible, and the trial judge erred in admitting the accused's written pretrial statements which followed the oral one.

Sentence adjudged 12 November 1971 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Harold W. Gardner. Approved sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for fifteen (15) years, and reduction to airman basic.

Appearances: Appellate Counsel for the Accused: Colonel George M. Wilson and Captain Robert L. Bridge. Captain Gary P. Snyder and Captain David W. Hess filed a brief on behalf of the accused. Appellate Counsel for the United States: Major Stark O. Sanders, Jr. and Captain Fred W. Kuhn.

DECISION

CHOVANEC, Judge:

Tried by a general court-martial which included members, the accused was convicted of three charges alleging, in order, violations of the Uniform Code of Military Justice, Articles 81, 92 and 134. The specification of Charge I alleged a conspiracy to wrongfully communicate classified information; the specification of Charge II alleged a violation of Air Force Regulation 205-57 occasioned by a failure to report contact with a foreign government representative; and the four specifications of Charge III alleged, respectively, wrongful delivery of documents relating to the national defense; wrongful communication of classified information; wrongful copying of documents respecting the national defense; and a wrongful attempt to deliver documents relating to the national defense. Convicted of all charges and specifications despite his contrary pleas, the accused was sentenced to dishonorable discharge, confinement at hard labor for 15 years, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence and directed confinement at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pending completion of appellate review.

Trial defense counsel have included 40 assigned errors in the accused's request for appellate representation. Appellate defense counsel have assigned four more, three of which incorporate and restate some of those claimed by trial defense counsel. In sum, the case reaches this Court with 39 assignments. Because of our disposition of the case, we need discuss only those relating to jurisdiction and to the admissibility of the accused's pretrial confessions.

Jurisdiction is attacked on two bases;

the first attack is directed toward Charge I and its specification and toward Specification 2 of Charge III. The former specification alleges a conspiracy to commit an offense under Code, supra, Article 134; namely, a conspiracy

> "to wrongfully communicate to an agent of a foreign government, then known . . . to be an agent of a foreign government, information known . . . to have been classified as affecting the security of the United States in violation of Section 783(b), Title 50, United States Code. . . ."

The latter specification alleges the accused "wrongfully and in violation of section 783(b) of Title 50, United States Code" communicated classified information to an agent of a foreign government. The situs of both offenses is alleged to be Bangkok, Thailand. The accused's counsel say that Section 783(b) has no extraterritorial application and, as a result, the court-martial lacked jurisdiction of these offenses because —

> "[a] person subject to the code cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense, not capital, if the act occurred in a place where the law in question did not apply." Manual for Courts-Martial, 1969 (Revised edition), paragraph 213*e* (2).

A threshhold issue must be considered first. All of the specifications of Charges I and III are founded upon either a conspiracy to violate or upon an actual violation of the United States Code. The precise statutes involved are Section 783(b) of Title 50, as noted above, and Section 793(b) and 793(d) of Title 18.[1] At an Article 39(a) hearing prior to giving instructions on findings, the trial judge advised he intended to instruct the court that, to convict the accused of the specifications of Charge III, it must find that the accused's conduct was prejudicial to good order and discipline or was service discrediting. It is apparent the judge regarded the references to specific statutes in these specifications as mere surplusage. See United States v Long, 2 USCMA 60, 6 CMR 60 (1952). Trial defense counsel objected to these proposed instructions, contending the Government's allegations were based on the "crimes and offenses not capital" clause of Article 134 of the Uniform Code; that is, the third clause of that article, and not upon either of the first two clauses. See United States v Rowe, 13 USCMA 302, 32 CMR 302 (1962). Also compare United States v Adams, 19 USCMA 75, 41 CMR 75 (1969). After some discussion, during which the accused's counsel advised that the primary purpose for objecting to these instructions was to indicate the consistency of belief that "the territorial application of the respective Federal statutes control jurisdiction in the case", the judge resolved the matter against the accused and, subsequently, gave the instructions. We first address this conflict.

[1, 2] The trial proceedings do not disclose which of the two theories the Government relied upon in pleading the specifications involving the Federal statutes. Under these circumstances, we are justified in consulting the pretrial advice for guidance; that advice "constitutes the formal basis for the referring of the charges to trial." United States v Lenton, 8 USCMA 690, 25 CMR 194 (1958); see also United States v Schuller, 5 USCMA 101, 17 CMR 101 (1954). This document establishes the convening authority referred the affected specifications to trial on the basis that they alleged "crimes and offenses not capital" under the third clause of Article 134. There is no indication the Government relied on any other theory thereafter. Therefore, we hold that the affected specifications were alleged and were tried under the third clause of

[1] The manner of reference to Section 793(b) and 793(d) of Title 18 in the specifications to which they apply is identical to that employed in referring to Section 783(b) of Title 50 in Specification 2 of Charge III.

Article 134. United States v Smith, 21 USCMA 264, 45 CMR 38 (1972). In considering the jurisdictional question posed above, we will not concern ourselves at all with whether the offenses involved could also have been alleged and prosecuted under the first or second clause of that article. See United States v Smith, supra; United States v Wilmot, 11 USCMA 698, 29 CMR 514 (1960).

Section 783(b) of Title 50 provides:

"It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information."

Trial defense counsel contended this statute is territorial only because (1) criminal statutes are presumptively so unless the contrary intent clearly appears; (2) this statute is part of the Internal Security Act of 1950[2] which Act, by its own terms, was directed solely toward matters within the territorial limits of the United States; and (3) other statutes dealing with the same general subject matter were expressly territorial in application at the time the Internal Security Act of 1950 was enacted. We will not flesh out counsel's contentions further but do commend him for his diligence. We do not respond to his arguments because we believe it can easily be demonstrated in another manner that the statute has extraterritorial application.

The leading and often cited case on the subject is United States v Bowman, 260 US 94 (1922). Therein the Supreme Court articulated the following:

"We have in this case a question of statutory construction. The necessary *locus*, when not specially defined, depends upon the purpose of Congress, as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . .

"But the same rule of interpretation should not be applied to criminal statutes which are as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction,

[2] Act of September 23, 1950, ch 1024, 64 Stat 991. 50 USC 783(b) is the codification of Section 4(b) of this Act. The Act is neither specifically limited in its territorial application, nor specifically unlimited.

or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."

See also Reid v Covert, 354 US 1 (1957); Skiriotes v Florida, 313 US 69 (1941); Chandler v United States, 171 F2d 921 (1st Cir 1948), cert denied, 336 US 918 (1949); cf. Bell v Clark, 308 F Supp 384 (ED Va 1970).

[3] We believe the applicability of these principles to Section 783(b) is clear. Indeed, we find it difficult to envision a statute wherein the application could be clearer. Section 783(b), by its own terms, is intended to protect the United States against disclosure of information that would affect its own security as a nation; it is directed against its own "officer[s] or employee[s]"; the nature of the offense is such that it can be committed anywhere with no act incident thereto necessarily to be done within the United States; and the harm to the sovereign is clearly the same without regard to whether the security information is unlawfully communicated within the United States or beyond its territorial jurisdiction. Each test is met which supports the conclusion that the statute is "not logically dependent on [its] locality for the Government's jurisdiction." United States v Bowman, supra. We hold that Section 783(b) of Title 50, United States Code, is applicable extraterritorially, that it applied in Thailand where these offenses occurred, and that the court-martial had jurisdiction to try the offenses founded upon it.[3]

[4-6] The second attack on the jurisdiction of the court-martial is directed toward the specification of Charge I, and against Specifications 1, 2 and 4 of Charge III. The claimed basis for this lack of jurisdiction is

> "that the Government alleged a non-capital offense under Article 134, UCMJ, as a subterfuge to assert jurisdiction when in fact the Government knew, intended to prove, and introduced evidence at trial that the accused committed a capital offense in violation of Title 18, United States Code, Section 794."[4]

As already noted, the specification of Charge I and Specification 2 of Charge III alleged a conspiracy to violate and a violation of Section 783(b) of Title 50, United States Code, with specific reference to that statute being made in the specifications. Specifica-

[3] We also note the case of Scarbeck v United States, 317 F2d 546 (DC Cir 1962). Scarbeck was tried in the Federal District Court for the District of Columbia for three violations of this statute, the offenses having occurred in Poland. This conviction was affirmed. Although the question of the territorial application of Section 783 (b) does not appear as an issue in the reported case, it is evident that this approved conviction is consistent with our conclusion that the statute does apply extraterritorially.

[4] 18 USC 794(a) pertinently provides:

> "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document . . . or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life."

tions 2 and 4 of Charge III allege violations of Section 793(d) of Title 18. In Specification 2, a completed delivery of documents relating to the national defense to a person not authorized to receive them is pleaded. In Specification 4, an attempted delivery is alleged. Again, the specifications make specific reference to that statute.

The question of what offense is charged in an indictment and on what statute it is founded is a matter of law and is to be determined from the allegations in the indictment. United States v Poindexter, 293 F2d 329 (6th Cir 1961), cert denied, 368 US 961 (1962); United States v Mayer, 266 F 2d 747 (5th Cir 1959), cert denied, 361 US 875; United States v McKnight, 253 F2d 817 (2d Cir 1958); United States v Kuzma, 141 F Supp 91 (ED Pa 1954); see also United States v French, 10 USCMA 171, 27 CMR 245 (1959). The language of the several specifications here being considered, omitting the references therein to the statutes themselves, is a recital of the essential elements of the offenses proscribed by those statutes. It is clear, therefore, that the offense charged in each specification is that which is defined in the statute referred to in that specification. Since, in each case, those offenses are punishable by no more than confinement and a fine, they are non-capital offenses of which the court-martial had jurisdiction. United States v Kirsch, 15 USCMA 84, 35 CMR 56 (1964); see also United States v Safford, 19 USCMA 33, 41 CMR 33 (1969); United States v Harris, 18 USCMA 596, 40 CMR 308 (1969). The fact, if it is a fact, that the prosecution presented evidence in proof of these specifications that would have sustained a conviction of a violation of Section 794(a) of Title 18 is immaterial.[5]

Before considering the admissibility of the accused's confessions, we find it appropriate to note still another matter. Specifications 1 and 4 of Charge III allege the accused delivered and attempted to deliver documents relating to the national defense "having reason to believe the information contained in those documents could be used to the injury of the United States or to the advantage of a foreign nation." Both specifications are founded upon Section 793(d) of Title 18 which provides:

> "Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or *information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation*, willfully communicates, delivers, transmits . . . or attempts to communicate, deliver, [or] transmit . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." Emphasis supplied.

[7] When enacted in 1948, the forbear of Section 793(d) did not contain the phrase emphasized. It was added by Section 18 of the Internal Security Act of 1950 and, in part, was intended to have only limited effect. In reports accompanying S. 595 and H.R. 4703 committees of both houses of Congress made it clear that

> "[t]he phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' *would modify*

[5] We are aware of the recent Supreme Court decision in Furman v Georgia, 405 US 912 (1972). This decision raises doubt as to the validity of imposing the death sentence under any circumstances. We have found it unnecessary to consider whether, under the third clause of Article 134, one of the consequences of that decision might be to give courts-martial jurisdiction of offenses which has heretofore been denied them.

only 'information relating to the national defense' and not the other items enumerated in the subsection. . . ."[6] Emphasis supplied.

See also Footnote 9 of Mr. Justice White's concurring opinion in New York Times Company v United States, 403 US 713, 738 (1971). Since the items of Section 793(d) which the accused was charged with having unlawfully delivered and attempting to deliver were "documents relating to the national defense", it is evident that the additional pleading that the accused had "reason to believe the information contained in these documents could be used to the injury of the United States or to the advantage of a foreign nation" was superfluous.

Appellate defense counsel claim that the several pretrial statements of the accused were improperly admitted into evidence by the military judge because, as a matter of law, these statements were involuntary. To consider this assignment of error, a detailed recitation of trial testimony concerning the events which culminated in the statements being made is necessary.

In early June and, again, in mid-June, 1971, at Bangkok, Thailand, the accused was observed by a Thai policeman in conversation with one Mizin, an official of the Soviet Embassy in Bangkok. This information was relayed through an intermediary to Special Agent John D. Flood of the Air Force Office of Special Investigations (OSI). Investigation and surveillance followed, climaxed by the accused's apprehension in the city of Bangkok at about 2000 hours on 2 July. At the time of his apprehension, the accused had in his possession some twenty-five official documents, some of which were marked "Top Secret". The accused was taken out of the city to the United States Air Force facility at Don Muang Airport. The documents were seized and, shortly before 2100 hours, the accused was subjected to his first interrogation in the interview room of the OSI office at Don Muang. What follows is the account of the circumstances of this and later meetings between the accused and OSI investigators up to and including 7 July, the date upon which the accused gave his first oral inculpatory statement. These circumstances were recounted by Mr. Flood in his testimony at an Article 39(a) session at which this issue was litigated.[7]

"Questions by the trial counsel:

"Q. After you examined the documents what took place?

"A. . . . At this time I asked Sergeant DeChamplain whether he had any objections to conducting a search of his quarters. He did not answer, but shook his head no. I asked him if he would sign a consent to search his quarters. He again shook his head no. I reiterated, 'But you have no objection to us conducting a search of your quarters?' Again, he shook his head no. I asked him if he wanted to accompany the OSI agents in a search of his quarters and he shook his head no. I asked him if there would be other individuals at his quarters, he nodded his head yes. There would be, and again with the motions of his head he indicated there would be no other Americans present in his quarters; there would be Thai Nationals present to include his brother-in-law but not his wife. Then I dispatched three agents and two Thai policemen to go to his home to conduct a search of his quarters."[8]

. . . . .

"Q. Can you relate to the court the specifics as best you recall as

[6] S. Rep. No. 427, 81st Cong, 1st Sess 7 (1950); H Rep No. 647, 81st Cong, 1st Sess 4 (1950).

[7] That proper cautions as to the right to remain silent and to a lawyer were given on each occasion they were required is not disputed.

[8] Appellate Exhibit 14, an interview log maintained during this interrogation, shows the accused refused to "sign a consent for search" at 2113 hours.

far as what the interview consisted of on 2 July?

"A. We asked him what he was doing the dark street in Bangkok at eight o'clock at night with a package full of classified documents, and asked him if he was going to meet with the Soviets. General questions, where did he get the documents? What did he intend to do with them? Where was he going? With whom was he supposed to meet?

"Q. Did he answer any of these questions?

"A. No, he did not.

"Q. Did he say anything on 2 July?

"A. Not that I recall, no Sir."

. . . . . .

"Questions by the defense counsel:

"Q. Is it correct, Mister Flood, that during the entire time the only questions he even consented or responded to were questions concerning whether he would consent concerning the search itself and who was present?

"A. Yes.

"Q. But he refused even to respond, either in the affirmative or negative, during any other questioning?

"A. That's correct."[9]

This interview was terminated at 0017 hours, 3 July, and the accused was placed in confinement shortly thereafter. He remained in the status of confinement at all times pertinent to this inquiry.[10] He was next interrogated in the OSI interview room on 3 July beginning at 1530 hours. Mr. Flood's testimony continues:

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[9] Appellate Exhibit 14 also contains the following entry:

"During interview, [suspect] never said one word. When asked if he understood his rights, desired an attorney, would sign receipts for evidence and accept stubs. He remained motionless. He was advised that his not speaking, nodding or motioning indicated to us he understood his right, would not sign receipts, accept stubs. By nodding, [suspect] indicated he understood this procedure."

[10] Certain aspects of the conditions of the accused's confinement are significant. Sergeant Okopski, a Security Policeman on duty when the accused was first confined, testified:

"Questions by the defense counsel:

"Q. . . . Did Mister Flood give you any instructions concerning Sergeant DeChamplain?

"A. Yes, Sir, he said that he was to have no visitors. I believe, Sir, this was a holiday weekend and Mister Flood said he was to have no vistors over the weekend; and he was not to have any lawyers unless he requested them.

"Q. Did he give you any further instructions concerning who was to vist him?

"A. There was himself and one other OSI agent, but I don't know what his name was."

. . . . . .

"Questions by the military judge:

"Q. Do you know if at a later time the instructions that Mister Flood gave were modified in any way?

"A. They came out with a letter from the NCOIC of Security Police, Tech Sergeant Albertus, with further instructions on it but I can't remember. There were a few other people added to the list that he could have visiting him."

Appellate Exhibit 9B, an undated letter signed by Technical Sergeant A1 K. Albertus recites:

"This man [accused] is not to receive any vistors, except his Commander and OSI Representatives. He may make and receive telephone calls, however, the persons and numbers called will be recorded in a Memo For the Record. This man is not to contact any members of the press and no one will be allowed to loiter around the cell block area, this includes Thai Guards and everyone in or out of the service."

Further, Appellate Exhibit 9A dated 6 July and signed by the "Chief, Security Police", contains the following instructions: "Only OSI and/or SJA if he requests legal counsel will be allowed contact with detainee [accused]."

"Questions by the trial counsel:

"Q. Would you relate to the court what the interview consisted of?

"A. It consisted of essentially the same thing we tried to talk to him about on the night of the 2nd, what he was doing with the documents, where he had gotten them, had he copied the documents himself, or had he reproduced them himself, did he have authorization to have the documents, where he was going with them, what was he doing on the street at that time of night, and so on."

. . . . .

"Q. Did the accused say anything during this interview?

"A. Not that I recall, nothing pertinent to this investigation. He may have asked for a Coke or something like this, but nothing in response to our questions."

. . . . .

"Q. You have. . . . You related, if I recall correctly, that on 2 July your interview pertained only as to documents which the accused had in his possession. Is that correct?

"A. That is correct.

"Q. Was your interview on 3 July similarly restricted?

"A. Yes, I. . . . Yes."

. . . . .

"Questions by the defense counsel:

"Q. . . . Approximately, how long did the interview last on the 3rd of July?

"A. Approximately, one hour.

"Q. Did the accused answer any questions at that time?

"A. No."

. . . . .

"Q. Why did you terminate the interview?

"A. Essentially, Mister Zuckerman and I were talking to ourselves and it was a point in the interview where we saw that Sergeant DeChamplain was not going to answer any of our questions. We felt there was no value to stay there the rest of the afternoon."

This interrogation was terminated at 1632 hours and the accused was returned to his cell.

Mr. Flood next testifies as to his meeting with the accused on 4 July.

"Questions by the trial counsel:

"Q. When was the next time you saw the accused, Mister Flood?

"A. I saw him on the 4th of July, which was a Sunday.

"Q. And where did you see the accused?

"A. At this time I saw him at the confinement facility at Don Muang.

"Q. And why were you at the confinement facility and not the interview room?

"A. I went to the confinement facility to see if he needed anything, personal belongings or anything, was there anything he wanted from his home, from his office. I brought him the morning paper. I went out to see how he was doing.

"Q. Was the accused talking at this time?

"A. Yes. He said, 'Good morning', discussed how he was, how he felt, and whether he was getting food, and whatnot.

"Q. Did you interview the accused on the 4th of July?

"A. No, I did not."

. . . . .

"Q. Was there any discussion about the offense at all on 4 July, Mister Flood?

"A. I don't recall whether it was the 4th or the 5th. On one of those days I told him, 'you ought to get a lawyer'."

. . . . .

"Q. And what was the accused's response?

"A. He said that he did not feel that a lawyer would do him any good."

Again on 5 July there was a meeting between the accused and the agent described by Mr. Flood in the following colloquy:

"Questions by the trial counsel:

"Q. So you saw the accused on the 5th, is that correct?

"A. Yes, Sir, I did.

"Q. And, again, where did you see the accused on the 5th?

"A. In the confinement facility at Don Muang Airport.

"Q. And what were the circumstances of your seeing the accused on that day?

"A. Again, I brought him the paper. He had asked for. . . . I believe some soap and underwear. I brought it to him. Again, I went to see his general physical well-being to make sure that he was eating all right, what his general attitude was."

. . . . .

"Q. Was the accused talking on the 5th?

"A. Yes, he was."

. . . . .

"Q. What was the extent of the conversation?

"A. Essentially the same as before. I believe he talked about his home in Connecticut at this time. He mentioned that he was just eating one meal a day by choice."

. . . . .

"Q. Mister Flood, did you make an attempt to interview the accused on 5 July?

"A. No, I didn't."

Flood had no contact with the accused on 6 July but did on the day following. This interrogation, conducted at the OSI interview room, ultimately resulted in the accused making an inculpatory oral statement which is the principal target for appellate defense counsel's attack.[11] Again, we find it helpful and informative to quote substantial portions of Mr. Flood's testimony relating thereto.

"Questions by the trial counsel:

"Q. When was the next opportunity you had to see the accused?

"A. On the 7th of July.

"Q. And where was this?

"A. This was at our Detachment Office at Don Muang Airport."

. . . . .

"Q. Did you attempt to interview the accused at that time?

"A. Yes, I did.

"Q. And what was the extent of your interview?

"A. Proceeded along the same lines that I had previously concerning possession of documents, why he had them, how he got them, what he was doing out on the [street] that night.

"Q. Was the accused responding to your questions?

"A. Initially, no. He did not respond.

"Q. Did he at any time on 7 July respond to your questions?

"A. Yes, he did. At approximately 1500 hours, perhaps 1530, he began to answer questions that I put to him.

"Q. Can you recall specifically, Mister Flood, what part of the interview, at what part of the interview

[11] There are actually eight statements involved. The accused made oral statements on 7, 8, 12 and 13 July, each of which was later reduced to writing and signed by the accused. The prosecution offered and the judge admitted the written statements. At trial, defense counsel lodged an objection to all, contending that the oral statement of 7 July was involuntary and that this taint infected all others. The trial counsel did not actively dispute this and, apparently, the trial judge made his ruling on this basis. Later, when instructing the court as to the effect of his ruling admitting the written statements, the judge told them that unless they found beyond reasonable doubt the first oral statement to have been voluntary, they must disregard all statements. At this level, appellate defense counsel take the same position as did the trial defense counsel and further assert that the trial judge's instructions constitute the "law of the case". Appellate Government counsel do not question either claim and the evidence persuades us we have no reason to do so.

the accused started responding to your questions?

"A. Yes, I can. I asked him if he knew who he had been dealing with, the Soviets; whether he knew which particular intelligence service of the Soviet Union was involved. I told him. . . . I said that he had been playing around with the 'Big Boys', I think, is the term I used and that they generally did one of two things with an agent that had been caught. They either tried to help him, tried to get him loose, if they considered him worthwhile, an important agent to them; and I noted that I hadn't seen any action on the part of the Soviet Embassy on Sergeant DeChamplain's behalf. I said one other thing they could do. . . . I don't remember the exact terms that I used. . . . I said something like 'They either look out for you or they take care of you.' And at this point, Sergeant DeChamplain asked if we could step outside for awhile. We went outside the Detachment Office, walked around in front of the office. He motioned with his head to. . . . back into the office. He said, 'I'm scared to death of the corridors,' or something like this is why he wanted to step outside. He walked away from me for a while and then motioned me over with his head to where he was standing and then said, 'Do you remember what you asked me last, what you said last, about the Soviet Intelligence Service taking care of me?' I said, 'Yes.' And he said, 'That's what they threatened to do to my family.' I said, 'What do you mean'? And he said, 'Well, at the Mariners Club. . . .' . . . When he had met Mister Mizin at the Mariners Club, this is what they had threatened him with. They would harm his family if he ever told any one about his helping out the Soviets. I asked him if he really believed this. He said, yes, he did, that Mizin had shown him a photograph of his. . . . Sergeant DeChamplain's home in Connecticut. He said that they knew all about him and repeated again he was told that if he ever told anyone about his contact with the Soviets, that they would harm his family.

"Q. What transpired then?

"A. I told him I was sorry that he put more faith in the Soviet Government than he did in the American Government, that we would be able to. . . . through resources in the States to see that nothing happened to his family, that he should rely on the US Government to take care of his family for him. And we went back inside and began questioning him in detail concerning his contacts with the Soviets."

"Q. Did he respond?

"A. Yes, he did."

. . . . . .

"Questions by the defense counsel:

"Q. Did he . . . Were there any indications on either the 4th or 5th from him that he wanted to make a statement to you concerning the investigation?

"A. No.

"Q. Why did you go back out on the 7th of July?

"A. On the 7th, we went back out for the purpose of interviewing him.

"Q. You say 'we'?

"A. I did. I went.

"Q. You had no occasion on the 2nd, the 3rd, the 4th, or the 5th, any of those days, that he did want to give a statement; nevertheless, you did go out yourself.

"A. Yes.

"Q. To see if he wanted to give statements?

"A. Yes.

"Q. After you advised him of his rights, did he indicate to you that he did wish to give a statement?

"A. No."

. . . . . .

"Q. Between that time, how much time [elapsed] between that time [advisement of rights] and the time you made your comment concerning the 'Big Boys', that particular comment? Do you recall?

"A. I'd say an hour and a half to two hours, something like that.

"Q. And during that time, do I understand you were asking him questions concerning the investigation? Is that correct?

"A. Yes.

"Q. Was he responding to those questions?

"A. Yes.

"Q. In what way?

"A. He would not respond orally. He would shake his head no when questions would be 'Why don't you talk about it', or something like that. He would shake his head no.

"Q. He would shake his head no when asked him a question, for example, 'Why don't you talk about it?' He'd shake his head no indicating he did not want to say anything, is that correct?

"A. He indicated to me he was just shaking his head no, as I stated.

"Q. And during this two hour period, did he ever indicate otherwise? Did he ever indicate that he did want to make a statement prior to the time you mentioned. . . .

"A. That he did want to make a statement?

"Q. That he did want to make a statement?

"A. No.

"Q. And at the time you mentioned that he was dealing with the 'Big Boys', did you notice any physical change come over him?

"A. Yes, we'd been talking conversely [sic]. . . . We were talking about something, I don't recall what. It was not germane to the investigation.

"Q. I see. . . . .

"A. And when I mentioned this he. . . . I don't know how to explain it. He kind of slumped in his chair a little bit. His eyes dropped. He'd been looking at me and his eyes dropped.

"Q. Did you notice anything else about his eyes at that time other than that they dropped to the ground?

"A. When he looked up at me again, they were red.

"Q. And it was at this point that he asked to go outside?

"A. Yes.

"Q. And he walked by himself for a short time and then called you over?

"A. Yes."

. . . . . .

"Q. You went back into the interview room and he proceeded to talk to you. Is that correct? Answer your questions concerning the investigation?

"A. Yes.

"Q. Prior to this time. . . . to your mentioning this. . . . however, he had been willing to converse with you? Is that correct? As long as you did not concern matters relating to the investigation?

"A. Yes.

"Q. And anytime you'd ask him, 'Why don't you answer question about the investigation', he'd shake his head no?

"A. That's correct."[12] Footnote added.

. . . . . .

[12] When this issue was litigated with the members present, Mr. Flood indicated the form of this question may have been somewhat different, as illustrated by the following colloquy:

"Questions by the defense counsel:

"Q. Did he ever give you any response, any indication whatsoever, when you asked him questions concerning the investigation?

"A. Yes.

"Q. What was that?

"A. He would shake his head no.

"Q. And this was in response to what questions?

"A. Why don't you want to talk about it? Why aren't you willing to tell us about it?"

"Q. Did you ever ask him 'Will you give us a statement?' or 'Won't you give us a statement?'

"A. No, I did not.

"Q. So the questions you asked were what again?

"A. 'Why don't you want to talk about it? Why don't you tell us about it'?"

"Questions by the assistant trial counsel:

"Q. Did the accused at any time during the interview, at any time during any interview, ever indicate that he desired to terminate the interview?
"A. No.

"Q. In particular, on 7 July, did he ask to terminate the interview?
"A. No."

. . . . . .

"Questions by the military judge:

"Q. In relation to the discussion which you had with the accused on 7 July, when you told the accused that he'd been playing with, quote, 'Big Boys', end quote, and what the consequences. . . . what the Soviet people generally did with agents who were caught, is that all you said? Did you threaten him by saying, "We're going to turn you loose and see what happens'?
"A. No, sir.

"Q. Did you state this in a threatening manner or in what. . . . Could you give me a little more idea of the context in which this was said?

"A. As I recall, there wasn't any particular context. It was just something that was stated more or less in a general conversational tone, right out of the blue. There was no context that you put it in.

"Q. Now, you say after that statement . . . after the accused went outside and walked around and then came back in, you then began an interview to which the accused became responsive. Is that correct?
"A. Yes.

"Q. Verbally responsive?
"A. Yes.

"Q. What was his general manner or demeanor when he started to talk to you?

"A. He was upset. He was nervous. He . . . At the beginning, he was crying intermittently but not throughout.

"Q. Well, did he seem relieved or did he volunteer the information, or did you have to pump it out of him?
"A. Sir, he made a comment. He said, 'I'm so glad I'm telling somebody about this.[13]

"Q. So then the statement that you made. . . . How did you mean the statement. . . . For what purpose did you use the statement to the accused that he'd been playing with the big boys and telling him the result of their activities?
"A. Actually, at that time I was about ready to break off the interview, and I had no particular intention with that statement. It was a statement I made to him and I didn't really expect that it would have any effect on him." Footnote added.

. . . . . .

'Questions by the individual counsel:

"Q. You used the phrase 'take care of him', didn't you?
"A. I said 'take care of', but you're out of context now. I did not say to him that they would take care of him, no. I did not say that.

"Q. You were using the phrase in terms of the general way that, from your knowledge, that captured agents were dealt with?"

. . . . . .

"A. What I said to Sergeant DeChamplain to the best of my recollection is, I asked him if he knew who he had been dealing with. I mentioned something that they were the big boys in the Soviets, and I asked him if he knew how they handled agents of theirs who had been picked up. I said something to the effect, generally it was done in two ways. If he was of extreme value to them, they would generally try to assist him and that I had not seen any efforts on the part of the Soviets to come to his assistance. And secondly, that if they felt that he would be a threat to them and they were unable to be of assist-

[13] Defense Exhibit C establishes this statement was made at 1638 hours.

ance to him, that they take care of *them*. I did not say *him*. We were talking about agents in general.

"Q. You were talking about agents in general?

"A. Right. What conclusion he drew from that, I have no . . . .

"Q. You were willing to let him draw whatever conclusion he wanted to from that general statement?

"A. That's right.

"Q. But you hoped he drew a particular conclusion?

"A. I was ready to go. I had no hopes for that statement having much effect.

"Q. What did you say. . . . What effect . . . . You're talking about an effect, what effect are you talking about?

"A. Any effect. He had been, again as before, uncooperative in answering questions concerning the investigation. He was not answering. I was not getting anywhere. If any effect, it may have been that he would think about it for a little while."

The accused did not testify either at the Article 39(a) hearing or at any later time and it was with the evidence in this posture that the military judge preliminarily ruled the written statements admissible. It is this ruling that the accused's counsel say was erroneous. We agree, for three reasons. First, we believe the evidence demonstrates that the interview conducted by Agent Flood on 7 July was legally impermissible. Secondly, we believe the agent had a duty to stop that interview before the accused incriminated himself. And, lastly, we believe the inculpatory statement of 7 July was induced and was not the product of a knowing and voluntary relinquishment by the accused of his right to remain silent.

In United States v Attebury, 18 USCMA 531, 40 CMR 243 (1969), the United States Court of Military Appeals held a pretrial statement of an accused to have been improperly admitted in evidence upon the following facts and rationale:

> "It appears that the accused was interrogated three times in a four-day period by a Criminal Investigations Detachment agent. On the first occasion, he indicated a reluctance to speak about the alleged offenses and at the second interrogation he specifically refused to make any statement and the interview was terminated. At the third interview, after preliminary advice as to his right to remain silent and right to counsel, he engaged in conversation with the agent and this conversation led to an incriminating written statement. At trial, the statement was admitted in evidence over defense objection."
>
> . . . . . .
>
> "We are satisfied that this accused's repeated reliance upon his right to remain silent made it incumbent upon the agent to desist in his attempts to get the accused to talk."

See also United States v Miller, 42 CMR 747 (ACMR 1970); State v Godfrey, 182 Neb 451, 155 NW2d 438 (1968), cert denied, 392 US 937; Dyett v People, — Col —, 494 P2d 94 (1972); cf. United States v England, 21 US CMA 88, 44 CMR 142 (1971).

[8] The similarity between this case and *Attebury* is evident. The only difference of consequence we are able to discern is that, in *Attebury*, the accused is said to have "specifically refused to make any statement" on the occasion of the second interview. The Court does not advise us how this "specific" refusal was manifested; it may be the accused there told the agent he refused. But we will not speculate for, even if this is so, we are convinced that DeChamplain's actions during the interrogations of 2 and 3 July amounted to the same thing. Considering that he was advised of his right to remain silent before each interrogation commenced and was then plied with potentially incriminating questions for a total period of about four hours, his subsequent unwavering silence can only be deemed to have been

the exercise of that right. See United States v Kemp, 13 USCMA 89, 32 CMR 89 (1962); United States v Armstrong, 4 USCMA 248, 15 CMR 248 (1954); People v Jablonski, 38 Mich App 33, 195 NW2d 777 (1972); People v Burton, 99 Cal Rptr 1, 491 P2d 793 (1971); People v Randall, 83 Cal Rptr 658, 464 P2d 114 (1970); cf. United States v England, supra. The facts of this case bespeak to us one of

> "those situations in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer." Jennings v United States, 391 F2d 512 (5th Cir 1968) at page 515.[14]

See also State v Godfrey and Dyett v People, both supra.

We are also satisfied that the "accused's repeated reliance upon his right to remain silent made it incumbent upon the agent to desist in his attempts to get the accused to talk." United States v Attebury, supra. We are not to be understood as saying that an accused who has once asserted his right to remain silent can never again be interrogated about the case. Indeed, there is authority to the contrary. United States v McKinney, 40 CMR 1013, (AFBR 1969), pet. denied, 40 CMR 327; see also Judge Quinn's dissent in United States v Truman, 19 USCMA 504, 42 CMR 106 (1970). Nor do we hold that the relationship between two periods of custodial interrogation can never be attenuated. What we do hold is that, under the circumstances of this case, the agent was wrong in interrogating the accused on 7 July after he had repeatedly relied on his right to remain silent and the eventual fruit of that interview, the accused's first oral inculpatory statement was inadmissible, making his subsequent written statements likewise inadmissible.

We also believe the circumstances of the 7 July interview, both standing alone and in consideration of the totality of the circumstances, are such that the accused's oral statement of 7 July must be held to have been involuntary for other reasons.

In Miranda v Arizona, 384 US 436 (1966), the following principle is stated at page 473:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Footnote omitted.

See also Manual for Courts-Martial, 1969 (Revised edition), paragraph 140*a*(2); United States v Attardi, supra; United States v Howard, 18 USCMA 252, 39 CMR 252 (1969); United States v Barksdale, 17 USCMA 500, 38 CMR 298 (1968).

The facts are undisputed. The accused was warned of his right to remain silent at about 1305 hours on 7 July and said he understood. A period of questioning followed; the accused replied orally to questions not involving the matter under investigation but responded to questions tending to incriminate him with a negative shake of his head. The interview continued under these circumstances for at least an hour and a half. The record does not tell us the exact form of these potentially incriminating questions; it shows only what the form of one question was, that being "Why don't you talk about it?". And, as with all others, the accused is said to have responded to this question with a negative shake of his head.

[14] Paradoxically, Agent Flood was willing to accept the accused's silence as a manifestation that he understood his right to remain silent but was unwilling to accept the accused's silence as a reliance upon that right when he subsequently refused to respond to any questions.

The critical question is, of course, the effect of the accused's responses to the questions concerning the investigation. If they manifested that he wished to remain silent in reliance upon his right to do so, the interrogation should have been terminated at some point before the first incriminating statement was made. See United States v Bollons, 17 USCMA 253, 38 CMR 51 (1967). If it should have been terminated but was not, the accused's incriminating statement cannot have been "other than the product of compulsion, subtle or otherwise." Miranda v Arizona, supra.

Miranda provides that a suspect's reliance upon his right to remain silent can be indicated "in any manner." Thus, a suspect may indicate that he wishes to invoke his privilege to remain silent by means other than express statements, and no particular form of words or conduct is necessary. People v Randall, supra; see also People v Burton, supra; United States v Phelps, 443 F2d 246 (5th Cir 1971).

[9] With this in mind we must assess the import of his actions and must conclude the accused did indicate his desire to remain silent under the *Miranda* guidelines. He was told he had this right and said he understood it. He was asked personal questions and responded orally to them. But when the questioning touched on any aspect of the investigation, there was a marked change; he did not respond orally as he had to other questions but provided a negative response by shaking his head. This action on his part cannot in any rational and reasonable way be equated with a willingness to be questioned about matters which would or might incriminate him. Cf. United States v England and United States v Barksdale, both supra. To the contrary, this conduct is consistent only with the conclusion that he understood his right to remain silent with respect to matters that would incriminate him and manifested his desire to exercise that right in this way. Indeed, the agent admitted as much when he said, "[The accused] had been, again as before, uncooperative in answering questions concerning the investigation. He was not answering. I was not getting anywhere." We are not required to make a judgment as to just when the interview should have been terminated. It is sufficient to say that we are convinced the investigator had the duty to stop it at some point before the "big boys" statement was made and before the accused incriminated himself. See United States v Bollons, supra.

If special emphasis is placed on the single question and response revealed by the record, the result is not only the same but is reinforced. It seems to us that the accused's negative shake of his head in response to the question "Why don't you talk about it?" indicated one of two things; he either did not want to talk about matters concerning the investigation, or he did not want to tell the agent why he did not want to talk about them. In either event, the inherent basic premise necessarily has to be that *he did not want to talk about matters which could incriminate him.* Cf. United States v Barksdale, supra. That he chose that manner to indicate his wishes in favor of some more express way is of no consolation to the investigator. We hold, therefore, that the agent had a duty to terminate the interview of 7 July at some point before the incriminating statement was made. His failure to do so causes the accused's first inculpatory statement to be inadmissible, making his subsequent written statements likewise inadmissible.

[10] In considering our third reason for concluding the military judge erred in admitting the accused's confessions, we began with Manual, supra, paragraph 140*a*(2) which provides:

"Even if [the warning of the right to counsel] and the warning of the right to remain silent were given, a statement obtained at the interrogation from the accused or suspect without the presence of counsel may

> be regarded as not being the product of unlawful influence, and as being voluntary, only if it is affirmatively shown that with respect to the statement the accused or suspect freely, knowingly, and intelligently waived his right to the assistance of counsel and to remain silent."

See also Miranda v Arizona, supra, at page 479. The burden of proof to show admissibility is on the Government, United States v Bollons, supra; United States v Lake, 17 USCMA 3, 37 CMR 267 (1967); United States v Hardy, 17 USCMA 100, 37 CMR 364 (1967), and the responsibility initially of determining voluntariness is upon the judge. United States v Landrum, 17 USCMA 526, 38 CMR 324 (1968). If the judge admits the confession, his ruling must be supported by a preponderance of the evidence; United States v Mewborn, 17 USCMA 431, 38 CMR 229 (1968); the evidence adduced must clearly and convincingly demonstrate a waiver. United States v Barksdale, supra; United States v Miller, 453 F2d 634 (4th Cir 1972). In determining this question, the totality of the circumstances leading to and accompanying the giving of the statement are to be considered. Boulden v Holman, 394 US 478 (1969); Greenwald v Wisconsin, 390 US 519 (1968); United States v Planter, 18 USCMA 469, 40 CMR 181 (1969); State v Creekmore, 208 Kan 933, 495 P2d 96 (1972). Relevant to this determination are the mode of arrest, the manner of custody, and the method employed in exacting the confession. Allen v Kupp, 426 F2d 756 (9th Cir 1970).

[11] In this consideration, we first note United States v Handsome, 21 USCMA 330, 45 CMR 104 (1972). Therein the accused had denied complicity in the crime and agreed to take a polygraph test. The polygraph operator told the accused the test showed he was lying when he denied guilt and then the operator

> "cited an example of a person with the same test results who received a relatively severe sentence after continuing to deny guilt. He stated that the other suspect would have benefited by telling the truth and that Private Handsome would also benefit if he told the truth." United States v Handsome, supra, at page 107.

Immediately thereafter, Handsome admitted guilt. The Court found the operator's tactics amounted to unlawful inducement and influence as a matter of law, because "[t]he content of [the operator's] statements and the promptness of the admission that followed establish the strong likelihood of a cause-to-effect relationship."

There is much in *Handsome* that is similar to this case. However, the later case of United States v Carmichael, 21 USCMA 530, 45 CMR 304 (1972), also has similarities. There, the investigator's statement which preceded a confession "held out the possibility that a confession could result in the appellant's being tried by an American rather than a Chinese court." A majority of the Court distinguished the factual situation in *Carmichael* from that in *Handsome*, saying, as to the former, "the [investigator's] statement was not untrue and it was not an unqualified declaration that the appellant would benefit from confessing." The majority then held "that the possibility appellant's confession could influence a decision for trial by an American court presented at most a factual issue of unlawful inducement." Although we have great reluctance in accepting as the truth Mr. Flood's statements about how the Soviets "handled agents of theirs who had been picked up," particularly when that "agent" was an American serviceman incarcerated by American authorities, we are nonetheless unable to find that his statement that the accused should rely on the United States to protect his family amounted to "an unqualified declaration that the [accused] would benefit from confessing." To this extent, the facts of this case are also distinguishable from those in *Handsome*. On the other hand, of more significance is that the

facts in this case are also clearly distinguishable from those in *Carmichael*.

[12] Sergeant DeChamplain was confined at all times pertinent to this inquiry. The circumstances of his confinement, for whatever reason they may have been imposed, are that he was held in virtual incommunicado status from the beginning. Indeed, as late as 6 July, a written communication established his only permitted visitors were OSI agents and a lawyer, "if he requests legal counsel." He was interrogated on three separate occasions over a period of somewhat less than five days and for a combined total of at least five and one-half hours. During these interrogations he would not talk about his case. Finally, he did talk, but only after the "big boys" statement was made by the investigator. The effect of this statement on the accused is graphically described by the agent. "[The accused] kind of slumped in his chair a little bit. His eyes dropped." "When he looked up at me again, [his eyes] were red." A short walk outside the interview room was followed by the accused's statement that he had been told his family would be harmed if he revealed his involvement with the Soviet agent, his statement that he believed this, and the investigator's assurance that the United States Government could be relied on to protect the family. Again inside, the accused began to respond to incriminating questions at which time "He was upset. He was nervous. He . . . . At the beginning, he was crying intermittently but not throughout."

On the other hand, there is no evidence in the record that before giving the incriminating oral statement of 7 July, the accused affirmatively waived his right to remain silent. The agent was never asked about it. The only evidence we are able to glean from the record supporting a waiver at this point is that the accused was warned of his right to remain silent, said he understood, and, about an hour and a half later, began to respond to incriminating questions.

In United States v Carmichael, supra, the Court said:

> "The presence of improper influences or pressures in an interrogation does not alone taint a resulting statement. A necessary additional consideration is whether the statement was induced by such influences."

Considering the conditions of the accused's confinement and his refusal to talk about the matter under investigation during some five and one-half hours of questioning, we are convinced that his eventual inculpatory oral statement of 7 July was induced by Mr. Flood's preceding statements concerning the "big boys" and his assurance of Government assistance. This, notwithstanding Mr. Flood's statements may have been innocently made and did not amount to an unqualified declaration of benefit to the accused. Stating our conclusion alternatively, the "cause-to-effect relationship" between Mr. Flood's statements and the accused's inculpatory statement is manifest on the record; there is no substantial evidence in the record that the accused's admissions, following shortly after the agent's statements, resulted from forces other than those statements. United States v Handsome, supra. This circumstance also dictates the conclusion that the accused's first oral inculpatory statement was inadmissible, making his subsequent written confessions likewise inadmissible.

For the reasons stated, we hold that the military judge erred in admitting the accused's written confessions in evidence. Accordingly, we find the findings of guilty and the approved sentence incorrect in law and set them aside. A rehearing is ordered.

LETARTE, Senior Judge, concurs.

FRIEDMAN, Judge (concurring):

I concur but choose to express my views separately.

The principal decision sets forth several reasons for holding the confessions to be inadmissible. I base my determination that the accused's rights

were violated on but one set of circumstances. On 7 July 1971, OSI Agent Flood improperly interrogated the accused (and obtained his oral confession) after the accused asserted his right to remain silent. United States v Miranda, 384 US 436 (1966); United States v Tempia, 16 USCMA 629, 37 CMR 249 (1967); Manual for Courts-Martial, 1969 (Revised edition), paragraph 140*a*.

The evidence establishes that for about two hours on 7 July the accused, who had been advised of his rights, would answer no questions at all concerning the offenses. He communicated his desire to remain silent to Flood by shaking his head "no" when Flood asked pertinent questions. That the accused asserted his right to remain silent about his criminal activity and that Flood understood (but would not honor) the accused's desires is manifest in Flood's repeated questions to the accused—"Why don't you talk about it?" — "Why don't you answer questions about the investigation?" — "Why aren't you willing to tell us about it?"

Our dissenting Chief Judge seeks to surmount the obvious import of these questions by employing two expedients. First, he speculates that Flood did not really mean to say what the record shows he did say. Our Chief Judge believes it "more likely" that Flood "asked the questions with nothing more significant in mind than 'You have not talked or answered our questions about the investigation—why not?' or 'You haven't answered our questions thus far, why have you not yet been willing to do so'?" Apparently, the Chief Judge assumes, without demonstrating, that the questions as he restates them are less gross than the questions which were in fact asked. Assuming (but certainly not deciding) the restatement is less offensive to the law, the basic rules of judicial interpretation preclude such a radical redefinition of the evidence without some support in the record. Our Chief Judge finds this support by reading the questions of record "within the context of all the agent's testimony." However, the dissent fails to specify how the "context of all the agent's testimony" supports the restatement. In fact, Flood's testimony offers not one shred of support for the Chief Judge's speculations.

The Chief Judge's second expedient is no more persuasive than his first. Having failed to come to grips with the questions of record, the dissent airily dismisses them by finding "these questions to be of little significance." He thus disposes of critical evidence.

The dissent also seems to draw comfort in the fact the accused, having been advised he could terminate the interview, never announced his intent to do so. Of course, the controlling authorities furnish no basis whatever for such comfort. The law does not require the accused specifically to request termination of an interview. Rather, the law requires that the Government cease interrogation when an "individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent." See Miranda v Arizona, supra, at pages 473, 474. In law, such indication is tantamount to a request to terminate.

Finally, the dissent makes much of the fact the accused answered some trivial questions. The dissent finds such responses sufficient to conclude that the accused was willing to be questioned but reserved the option not to answer specific questions. In support of that view, the dissent cites United States v Attardi, 20 USCMA 548, 43 CMR 388 (1971); United States v England, 21 USCMA 88, 44 CMR 142 (1971); and United States v Barksdale, 17 USCMA 500, 38 CMR 298 (1968). The realities are that these authorities support the position of the majority of this Court. In all these cases there is substantial basis for determining that the accused wanted to be questioned, intending to answer, or not, as he chose. In the case at bar, the dissent finds, in essence, that the accused's response to trivial questions provides such a basis. The dissent determines, sub silentio, that there is reason to believe the accused wanted to continue

the interrogation, and risk incriminating himself in heinous crimes, so that he could engage in pointless banter. I must respectfully disagree. The record shows no such thing and logic compels a contrary conclusion.

The decision of the United States Court of Military Appeals in United States v Bollons, 17 USCMA 253, 38 CMR 51 (1967) is pertinent to this case. Upon interrogation, the accused Bollons, advised of his rights, indicated he did not want to incriminate himself. He did answer some relatively innocuous questions before confessing and he never specifically expressed his desire to terminate the interrogation. However, there was no indication he wanted to continue it and the United States Court of Military Appeals found his confession to be inadmissible. There is no measurable difference between *Bollons* and the case before us. Here, the accused's oral confession tainted his written confessions and it was error to admit them. See United States v Wimberley, 16 USCMA 3, 36 CMR 159 (1966).

AMERY, Chief Judge (dissenting):

While I agree with my brothers of the majority in their resolution of the the issues pertaining to jurisdiction, I do not agree with their conclusion that the accused's pretrial statements were inadmissible.

The evidence indicates that the accussed was properly advised of his rights against self-incrimination and to counsel prior to each interrogation, that the accused indicated he understood his rights, and that he did not ask for a counsel—in fact, on one occasion when OSI Agent Flood actually urged him to get a lawyer, the accused declined, stating that he did not feel that a lawyer would do him any good. According to Agent Flood, the accused was also informed that he "could break up any interview that we were conducting with him at any time he so desired."

In the principal opinion, my brothers hold that the accused's failure to answer any questions during the questioning on 2 and 3 July, except those pertaining to a search of the accused's quarters (questions which he answered by either nodding or shaking his head), and his silence for the remainder of the questioning, amounted to a refusal to answer any further questions. In support of this they cited United States v Attebury, 18 USCMA 531, 40 CMR 243 (1969). In that case the accused *specifically refused* to make any statement, whereas the accused in the instant case never expressly or verbally refused to answer and never asked that any interview be terminated, although he knew that he could do so at any time, I cannot equate the accused's silence in this case with the specific, express refusal mentioned in United States v Attebury, supra.

Nor do I believe that the shaking of the accused's head in the negative during the 7 July interrogation rendered his ensuing statement inadmissible. He did speak and answer some questions during that interview and prior thereto, although his answers and comments concerned matters other than those for which he was under investigation. In my view, his shaking of the head when asked incriminating questions on 7 July more closely resembles the type of cases where the United States Court of Military Appeals has upheld interrogations which have been allowed to continue even though an accused has failed or refused to answer *specific questions* rather than a situation where an accused asserts his right to remain silent or demands the interview be terminated. United States v Attardi, 20 USCMA 584, 43 CMR 388 (1971); United States v England, 21 USCMA 88, 44 CMR 142 (1971); United States v Barksdale, 17 USCMA 500, 38 CMR 298 (1968).

The point my brother Friedman, in his separate concurring opinion, holds most crucial as proof that the accused must have communicated the fact that he had asserted is right against incrimination to Agent Flood (who was thereupon duty-bound to end the interview), concerns certain questions the agent asked the accused on 7 July. I

believe that such an interpretation is reading far too much into those questions ("Why don't you talk about it?—"Why don't you answer questions about the investigation?—"Why aren't you willing to tell us about it?"). Instead of announcing, by means of these questions, that he had reached a determination, within the purview of *Miranda-Tempia*, that the accused had succeeded in expressing his refusal to make any statement and that if he did thereafter make any statement it would not be of his own free will, etc., I think it is far more likely, taking these questions within the context of all the agent's testimony, that Agent Flood asked the questions with nothing more significant in mind than, "You have not talked or answered our questions about the investigation—why not?" or "You haven't answered our questions thus far, why have you not yet been willing to do so?" I would not read into Agent Flood's questions any suggestion of a determination that the accused by his inaction had expressed or indicated a definite decision as to his willingness or unwillingness to make a statement then or in the future. Moreover, when the accused shook his head in response to the questions "Why don't you talk about it?" I find it as likely that he could have meant by it that he simply did not know or couldn't think of an answer, as any other interpretation. I find these questions to be of little significance.

I believe the interrogations were neither so numerous nor so protracted as to become coercive or amount to improper inducement. According to Agent Flood, after the accused began to make his first inculpatory statement he indicated his relief when he commented tearfully, "I'm so glad I'm telling somebody about this." Thus, his making of the statement may have been prompted as much by his conscience and a desire to make a clean breast of things as any other reason. On the other hand, apparently fear of what the Soviets might do to his family in Connecticut may have had some part in causing the accused to confess, but this concerned a matter that his Russian accomplice, Mr. Mizin, had implanted in the accused's mind on a prior occasion. Although Agent Flood's remarks about the "big boys," which reminded the accused of this matter, may have amounted to a stratagem to help get the accused to answer his questions, I believe the agent neither compelled nor coerced nor illegally induced the accused to respond. Cf. United States v Payne, 6 USCMA 225, 19 CMR 351 (1955); United States v Carmichael, 21 USCMA 530, 45 CMR 304 (1972).

I would hold the accused's pretrial statements to be properly admitted by the military judge and affirm the conviction.

HALICKI and BREWER, Judges not participating.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

1. Pursuant to the Uniform Code of Military Justice, Article 67(b)(2), the record of trial, and the decision of the United States Air Force Court of Military Review, in the above entitled case, are forwarded for review.

2. The accused was tried by General Court-Martial convened at Anderson Air Force Base, Guam, on 12 November 1971, and contrary to his pleas was convicted of conspiracy to communicate to an agent of a foreign government classified information affecting the security of the United States and violation of a general regulation by failing to report contact with an agent of a foreign hostile government in violation of Articles 81 and 92, Uniform Code of Military Justice; and four offenses in violation of Article 134, Uniform Code of Military Justice, to wit:

Specification 1—Delivery to an unauthorized person copies of documents relating to national defense.

Specification 2—Wrongfully communicating classified information affecting the security of the United States.

Specification 3—Wrongfully copying classified security documents relating to national defense.

Specification 4—Wrongfully attempting to deliver to unauthorized persons copies of classified security documents relating to national defense.

He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances, to be confined at hard labor for 15 years, and to be reduced to the grade of airman basic. The sentence was approved by the convening authority on 23 February 1972. The United States Air Force Court of Military Review on 5 October 1972 set aside the approved findings of guilty and the sentence as incorrect in law and ordered a rehearing.

3. It is requested that action be taken with respect to the following issue:

"WAS THE COURT OF MILITARY REVIEW CORRECT IN HOLDING THAT THE MILITARY JUDGE ERRED IN ADMITTING THE ACCUSED'S WRITTEN CONFESSIONS IN EVIDENCE?"

JAMES S. CHENEY
Major General, USAF
The Judge Advocate General
United States Air Force

Received a copy of the foregoing certificate for Review this 1st day of November 1972.

GEORGE M. WILSON
Colonel, USAF
Appellate Defense Division

CHARLES F. BENNETT
Colonel, USAF
Appellate Government Division